DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-218616 **DATE:** August 7, 1985

MATTER OF: McGean-Rohco, Inc.

DIGEST:

1. Protester's contention that an RFP to which was attached a specification stating that award would be made only for products qualified for listing on the appropriate qualified products list at time of bid opening should be interpreted as requiring qualification at the time set for receipt of initial proposals is denied since, in a negotiated procurement, award can be made to an offeror whose product is qualified at the time of award.

2. Protester's contention that at the time of award of negotiated contract, the awardee's product was not qualified for listing on a required qualified products list is denied since the product had successfully completed all tests in accordance with the specification and the contracting officer had been so notified.

3. Protest that solicitation was defective based upon alleged impropriety apparent on face of solicitation is dismissed as untimely where filed after bid opening.

McGean-Rohco, Inc., protests the Department of the Navy's award of a contract for paint remover to Turco Purex Industrial, Inc., under request for proposals (RFP) No. N68836-85-R-0049. McGean contends that Turco's offer was nonresponsive because, on the date for proposal receipt, it was allegedly not eligible for listing on the appropriate qualified products list (QPL); and that the RFP was defective because it did not incorporate a mandatory QPL clause from the Federal Acquisition Regulation (FAR). McGean requests that the award to Turco be terminated for the convenience of the government and award made to McGean

as the lowest priced offeror whose product met the QPL requirement, or that the requirement be resolicited with the FAR clause included.

We dismiss the protest in part and deny it in part.

The RFP was issued on March 15, 1985, by the Naval Supply Center, Jacksonville, Florida. The specifications required that the paint remover comply with Military (MIL) Specification No. MIL-R-81294C, which, among other things, limited awards to products that were, "at the time set for opening of bids, qualified for inclusion in QPL-81-294, whether or not such products have actually been listed by that date." The RFP did not incorporate the clause in FAR, 48 C.F.R. § 52.209-1 (1984), which provides notice in the solicitation that award is limited to products on a specified QPL. The clause also states that the product must be qualified at the time set for opening of bids, or at the time of award in negotiated procurements, whether or not the product is actually included in the QPL.

On April 15, nine proposals were received. McGean's price of $329,175 was the fourth lowest; Turco's price of $115,500 was the lowest. At that time, McGean was the only offeror who had been informed that its product met the requirements for listing on the QPL. Turco's product had completed preliminary testing at the Naval Air Development Center (NADC), Warminister, Pennsylvania, and had been forwarded on April 8 to the Naval Air Rework Facility (NARF), Jacksonville, for final field service testing. Two days after the proposals had been received, NARF orally informed the contracting agency that the field testing of Turco's product had been completed. A message by NARF to NADC was sent on April 25 stating that the product had been tested and performed satisfactorily in accordance with the MIL specification. On April 30, the Navy made award to Turco.

McGean concedes that there was no "bid opening" in this case, but insists that it would be absurd to interpret the MIL specification as applying only to IFBs and not the RFPs. McGean contends that Turco's product was not QPL qualified until May 22 when Turco was formally informed by letter that its product would be listed.

The use of a QPL is a method of procurement that is inherently restrictive of competition. For that reason, we will interpret the regulations relating to the use of QPL procurements in a manner that will not result in unnecessary restrictions on competition. See 51 Comp. Gen. 47 (1971). Further, the purpose of a QPL is to allow the efficient procurement of those types of products which require testing in order to insure their compliance with specifications requirements. T.G.L. Rubber Company, Ltd., B-206923, Sept. 20, 1982, 82-2 CPD ¶ 239. It follows, then, that the use of a QPL is for the benefit of the government and not for the benefit of any particular offeror. Since this is a negotiated procurement and not one using the sealed bid method, we also think it appropriate that the rules applicable to negotiated procurements be applied to the facts of this case, even though the MIL specification in question refers to formally advertised procurements only. The use of negotiated procedures results in a less restrictive application of the QPL rules because it permits the award of a contract to an offeror whose product is qualified at the time of award, rather than at the time of bid opening in sealed bid procurements, or, as the protester argues here, at the time of the receipt of initial offers.[1/]

While there seems to be some confusion as to the actual date field testing was completed, we are satisfied from an examination of the record that the tests were satisfactorily completed before the April 30, 1985, award date, that this fact was communicated to the contracting officer by the testing activity, and that the formal letter of approval was not issued until after award (May 22). The issue, then, is whether the awardee's product was qualified for listing on the QPL prior to the date of the letter notifying it of that fact. We think that it was. In 51 Comp. Gen. 47, supra, we held that the issuance of a letter of approval was a ministerial act and that the government should not be deprived of the benefit of the lower bid "merely because it had not completed the paperwork." We

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[1/] Section 303 D(c)(4) of the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. 98-577, Oct. 30, 1984, 98 Stat. 3066, while not effective at the time the solicitation was issued, permits an offeror to demonstrate that its product meets or can meet the standards established for qualification before the date of award.

recognized in that case that in other circumstances, we had held that the effective date of the qualification was the date of the letter of approval, but we noted also that in those cases (1) the tests were only partially successful so that the approval letter itself involved an element of discretion that was necessarily exercised in the issuance of the approval letter, and (2) that the products were listed in the letter without reference to the testing date. McGean notes that the letter in this case refers to "this letter" as the qualification reference rather than the testing date and concludes that the letter itself is therefore the essential element for approval. From this, McGean reasons, approval was not granted until after award.

We reject this reasoning. First, there does not appear to be any discretion necessary in the issuance of the letter of approval in question, that is, the product either passed the test or it did not. As in 51 Comp. Gen. supra, the letter itself appears to us to be nothing more than the completion of the paperwork necessary to have the product listed on the appropriate QPL. We attach no special significance to the qualification reference being "this letter" rather than the testing date because it does not alter the substantive finding that was made when the tests were successfully completed. In our view, the purpose of the QPL requirement has been satisfied by the completion of the requisite tests. We therefore conclude that the award in this case was proper.

In the alternative, McGean argues that the solicitation was defective for failure to include the mandatory QPL clause in FAR § 52.209-1(a). This ground of protest is dismissed as untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a) (1985), which require that protests providing alleged improprieties in a solicitation must be filed prior to bid opening.

The protest is dismissed in part and denied in part.

for Harry R. Van Cleve
General Counsel